

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
April 17, 2007 Session

**STATE OF TENNESSEE v. JAMES ANTHONY ANDERSON**

**Appeal from the Circuit Court for Williamson County**  
**No. I-CR101369     Jeff Bivins, Judge**

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**No. M2006-01772-CCA-R3-CD - Filed June 8, 2007**

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The Defendant, James Anthony Anderson, appeals from the sentencing decision of the Williamson County Circuit Court. The Defendant was indicted for two counts of domestic assault and, subsequently, he pled guilty to one count of domestic assault. Pursuant to the terms of the plea agreement, he received an eight-month sentence, and the trial court was to determine the manner of service. Following a sentencing hearing, the trial court ordered that the Defendant's eight-month sentence be served in the county jail. On appeal, the Defendant argues that the trial court erred by ordering a sentence of confinement rather than a less restrictive alternative. Finding no error, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Joshua L. Rogers, Franklin, Tennessee, for the appellant, James Anthony Anderson.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Tammy J. Watson, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**  
**Factual Background**

A Williamson County grand jury returned an indictment against the Defendant in October of 2005, charging him with two counts of domestic assault of his sister. On April 6, 2006, the Defendant pled guilty to one count of domestic assault, a Class A misdemeanor, and the remaining

count was dismissed. See Tenn. Code Ann. §§ 39-13-101, -111. The plea agreement provided for a sentence of eight months and that the manner of service would be submitted to the trial court.<sup>1</sup>

A sentencing hearing was held on August 8, 2006. The charges against the Defendant originated from an altercation between the Defendant and his fourteen-year-old sister occurring during the early morning hours of April 30, 2005. According to Mrs. Sherly Berket, the mother of both the Defendant and the victim, at approximately 4:30 a.m. on April 30 she attempted to wake up the victim in order for her to attend a horse show. The victim began “hollering some very unpleasant things” at her mother. The Defendant was awoken by the argument and attempted to intervene, stating to the victim, “Quit hollering at Momma and talking so mean to her.” The victim responded to the Defendant, “You leave me the hell alone. You don’t live here.” The victim then “jumped right at [the Defendant] like she was going to hit him.” The Defendant grabbed the victim, threw her down on the bed, and held her there while she cursed and kicked him. The Defendant was returning to his bedroom when the victim again began yelling at the Defendant, “pounding her feet, coming down the hallway.” The Defendant “jumped up” and said to the victim, “[G]et out of my face.” The Defendant was walking toward the victim, when the victim, who was backing away from the Defendant, fell and hit the coffee table.

The Defendant’s mother testified that the Defendant never struck or pushed the victim. Mrs. Berket stated that the Defendant’s “heart was in the right place[.]”

On cross-examination, Mrs. Berket admitted that she asked the Defendant to stay away from her home following this incident, that she was aware that the Defendant had previously been charged with assaulting or abusing three different household members, and that she knew the Defendant had abused illegal drugs. She also stated the Defendant had a “problem controlling his anger” and that he was not paying child support for his son. Mrs. Berket believed that the victim’s disrespectful words towards her warranted the Defendant’s actions.

Proof was introduced at the sentencing hearing that the Defendant had one son, who was two years old, and his current girlfriend was expecting a child. The trial court was also presented with evidence that the Defendant worked full time at a heating and air conditioner company for a period of two years. The Defendant’s employer wrote a letter to the trial court on the Defendant’s behalf.

Although a presentence report was not prepared for the Defendant’s sentencing, the State introduced proof through a presentence memorandum that the Defendant had previously been convicted of child abuse, resisting arrest, simple assault, failure to appear, and two separate charges of domestic assault. The State also introduced proof that the Defendant had twice violated the restrictions of his bond and twice violated the conditions of his probation. The Defendant did not object to the sentencing memorandum.

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<sup>1</sup> The transcript of the guilty plea proceeding was not included in the record on appeal.

At the conclusion of the sentencing hearing, the trial court denied any form of alternative sentencing and ordered the Defendant to serve his sentence in the county jail. It is from the sentencing decision of the trial court that the Defendant appeals, arguing that the trial court erroneously denied his request for an alternative sentence.

## ANALYSIS

Misdemeanor sentencing<sup>2</sup> is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. See Tenn. Code Ann. § 40-35-302(b). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. See State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). One convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumptive sentence. See State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the court is required to provide the parties with a reasonable opportunity to be heard as to the length and manner of service of the sentence. See Tenn. Code Ann. § 40-35-302(a). The trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. See id. at (e).

In the present case, the trial court found that the Defendant was not a favorable candidate for alternative sentencing, reasoning as follows:

The Court has heard the testimony of his mother with regard to the nature of the circumstances of the offense here today. The Court particularly though looks to the prior criminal record in this matter. It is a record replete with numerous charges of violence, with numerous violations of probation and whether in fact there has—he has not been required to serve, perhaps that’s part of the problem.

In this situation the Court is even willing to consider the nature of the circumstances of the offense. And perhaps if the nature and circumstances of this particular offense is not nearly as egregious as some of his prior actions and the Court is taking that into consideration. The Court also notes and thinks that the mitigating

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<sup>2</sup> In State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), our supreme court concluded that Tennessee’s sentencing laws did not violate the dictates of Blakely v. Washington, 542 U.S. 296 (2004). The United States Supreme Court recently vacated the judgment in Gomez and remanded that case to the Tennessee Supreme Court for further consideration in light of Cunningham v. California, 549 U.S. —, 127 S. Ct. 856 (2007). See Gomez v. Tennessee, 127 S. Ct. 1209 (2007). Nonetheless, even prior to Gomez, this Court held that Blakely had no impact on a trial court’s sentencing determinations involving misdemeanor convictions. See State v. Jeffrey D. Hostetter, No. M2003-02839-CCA-R3-CD, 2004 WL 3044895, at \*8 (Tenn. Crim. App., Nashville, Dec. 29, 2004).

factors suggested by counsel<sup>3</sup> for the [D]efendant may well apply in this case. However, the Court finds those to be entitled to very little weight in this matter. The Court finds that there have been measures of less restricted means applied to [the Defendant] numerous times in the past, and he has failed repeatedly to abide by those provisions. The Court also notes for those additional reasons that there appears to be a lack of potential for rehabilitation in this matter.

The record is replete instances after instance after instance in which he has simply failed to learn his lesson. . . . So based upon that and the Court considers the totality of the circumstances here, the Court has no option other than to order [the Defendant] to serve the entire eight months in confinement.

The Defendant contends that “the trial court erred during sentencing by placing all of the emphasis on the Defendant’s prior criminal history. In light of the nature and circumstances of the underlying offense, the trial court erred by placing little or no weight on the other sentencing considerations and mitigating factors.”

While the trial court noted that confinement may not have been necessary to avoid depreciating the seriousness of the offense, the trial court correctly determined that confinement was necessary to protect society by restraining the Defendant who had a long history of criminal conduct and that measures less restrictive than confinement had been applied unsuccessfully to the Defendant. See Tenn. Code Ann. § 40-35-103(1). The Defendant’s criminal history—convictions for child abuse, resisting arrest, simple assault, failure to appear, and two separate convictions of domestic assault—coupled with his multiple violations of bond restrictions and probation conditions are sufficient alone to deny an alternative sentence. We conclude that the trial judge acted within his discretionary authority in denying the Defendant a sentencing alternative to incarceration. Accordingly, the judgment of the trial court is affirmed.

## CONCLUSION

Based upon the foregoing, we conclude that the trial court did not err in denying the Defendant an alternative sentence. Accordingly, we affirm the sentencing decision of the Williamson County Circuit Court.

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DAVID H. WELLES, JUDGE

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<sup>3</sup> Counsel for the Defendant argued that the following mitigating factors applied: (1) The Defendant acted under strong provocation; (2) Substantial grounds exist tending to excuse or justify the Defendant’s criminal conduct, though failing to establish a defense; and (3) The Defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. See Tenn. Code Ann. § 40-35-113(2), (3), (11).